No. 00-264

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LEONARD S. LEVINE,

Petitioner,

—v.—

HAUPPAUGE PUBLIC SCHOOLS; ROBERT C. DALLOW, in his Capacity as Acting Superintendent, Hauppauge Public Schools and as Principal of Hauppauge High School; ROBERT C. PARRY, in his Capacity as Superintendent of Hauppauge Public Schools; BOARD OF EDUCATION, Hauppauge Public Schools; ROBERT BIELLO, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; FRANK PROCACCINI, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; ANITA GAGLIARDI, in her Capacity as Member of the Board of Education, Hauppauge Public Schools; DONALD LESLIE, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JAMIE FAIRLEY, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JOYCE O'LEARY, in her Capacity as Member of the Board of Education, Hauppauge Public Schools and PAUL A. LOCHNER, in his Capacity as Superintendent, Hauppauge Public Schools,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEVIN G. MCMORROW
JOSEPH M. O'CONNOR
Counsel of Record
AHMUTY, DEMERS & MCMANUS
Attorneys for Respondents
Hauppauge Public Schools, et al.
200 I.U. Willets Road
Albertson, New York 11507
(516) 294-5433

18PA

QUESTION PRESENTED

Whether certiorari should be granted where the district court properly granted summary judgment, pursuant to Fed. R. Civ. P. 56(c), finding no genuine issue of material fact, thereby, entitling Respondents to judgment as a matter of law.

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OPINIONS BELOW

On August 10, 1999, the Honorable Jacob Mishler, United States District Court for the Eastern District of New York, issued an order granting the motion of the Respondents for summary judgment, pursuant to Federal Rule of Civil Procedure 56(c), finding no genuine issue of material fact, thereby dismissing all federal claims against the Respondents.

Petitioner appealed from said order and on March 28, 2000, the United States Court of Appeals for the Second Circuit denied Petitioner's appeal finding that Petitioner had failed to raise a genuine issue of material fact or causally connect the actions of the Respondents to his alleged exercise of his First Amendment rights.

A copy of the original judgment of the District Court as well as the order of the United States Court of Appeals for the Second Circuit are already set forth in Petitioners' appendix.

PROVISIONS AND RULES INVOLVED

Civil Rights Act—42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Rule 56(c) of the Federal Rules of Civil Procedure, F. R. Civ. P. 56(c), provides in pertinent part:

> (c) Motion and Proceedings Thereon.
>
> The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

STATEMENT OF THE CASE

The Petitioner, Leonard Levine, (hereinafter referred to as "Mr. Levine") was a high school assistant principal and a tenured administrator within the school district at all relevant times. Mr. Levine was the subject of two disciplinary actions as a result of violating the established district policy of the Hauppauge Public Schools. The first disciplinary proceeding was resolved at the close of the 1992/1993 school year with an admission of guilt by Mr. Levine. The proceedings were commenced because Mr. Levine knowingly permitted his daughter to attend school within the district, while she resided outside the school district, without paying tuition as was required for a non-resident student.

It is undisputed, that as a high school assistant principal and tenured administrator, the Petitioner was aware of the residency requirements and tuition assessed to non-resident children attending the school. The investigation was commenced by the school district due to the involvement of an assistant principal and a teacher in the violation of district policy and because the deception involved fraudulent modifications made within the school district records to conceal the actual residence of Mr. Levine's daughter.

As a high school assistant principal and tenured administrator, Mr. Levine had an obligation to the School District to follow District policy and not to place himself or his family above the law. Mr. Levine does not dispute the fact that he concealed the residency of his daughter from the School District despite being aware of her attendance in the School District.

An investigation was conducted concerning the failure to pay tuition by Mr. Levine and his wife, also an employee and teacher in the district, resulting in disciplinary charges being preferred against both of them on or about April 15, 1993, pursuant to provisions of Section 3020-a of the New York State Education Law. It is also undisputed that the child's records were improperly changed to give the appearance of a Hauppauge residence when such was not the case.

The Petitioner, Leonard Levine, admitted guilt to the charges and specifically asked to bear a greater portion of the responsibility than his wife, who also admitted guilt. The terms of the stipulation of settlement were negotiated between Mr. Cohen, the attorney for the School District, and Mr. Levine's counsel, John Ray, Esq. The Petitioner elected to enter into a stipulation of settlement along with his wife requiring Mr. and Mrs. Levine to each repay the district one-half of $22,130.00 as tuition for their daughter's attendance in the school district. Pursuant to the agreement, Mr. Levine also agreed to pay a fine equivalent to three months salary.

The second disciplinary proceeding concerned an incident, which occurred two days into the next school year. Mr. Levine struck a student in the back of the head for refusing to adhere to his directive to pick up a piece of paper that had been thrown on the floor of the school cafeteria. Numerous witnesses appeared on behalf of the student and testified that Mr. Levine struck the back of the student's head with significant force. After the slapping incident, Mr. Levine met with the child's parents and a guidance counselor to discuss the incident. Mr. Levine promised to make a public apology to the student. Due to a belief that Mr. Levine's apology was without sincerity and demonstrated no remorse, the child's parents elected to pursue a complaint

against Mr. Levine. Mr. Levine was afforded a full hearing on the issue of this violation of the school district's corporal punishment policy which forbids the striking of a student by a staff member. After the hearing, a decision was rendered by a panel of three impartial individuals, wholly unrelated to the school district, finding that the plaintiff had violated the District's corporal punishment policy.

Mr. Levine never sought judicial review of the voluntary settlement he entered into with the assistance of counsel for his violation of the school district's non-resident student policy. The disciplinary proceeding for this violation and the resulting settlement were resolved by May 28, 1993, more than three years prior to the initiation of the current law suit on June 12, 1997. The Second Circuit properly applied a three-year statute of limitations to the Petitioner's claims of a constitutional violation under 42 USC Section 1983. The Petitioner has not challenged the portion of the Second Circuit's decision which held that all claims concerning the Petitioner's punishment for violating the District's non-resident student policy were time barred by the applicable statute of limitations.

Mr. Levine sought review of the conviction related to the slapping of the student. Justice Michael Mullen of the Supreme Court of Nassau County dismissed Mr. Levine's Article 78 proceeding which challenged the results of the hearing panel and the three-year suspension. In the Article 78 proceedings, Justice Mullen concluded that the punishment of three years suspension was appropriate based on Mr. Levine's actions. Mr. Levine was represented in connection with the second 3020-a proceeding and the Article 78 proceeding by Paul Derkasch, Esq. The Second Circuit properly concluded that Mr. Levine was collaterally stopped from relitigiating the imposition of or the severity of the penalty since the identical

issue was necessarily decided in the Article 78 action, where the Petitioner had a full and fair opportunity to contest the prior determination. The Petitioner has elected not to challenge this portion of the Second Circuit's decision and therefore is bound by the determination that the imposition of a three-year suspension was an appropriate response to his striking of a student. The Second Circuit further held that Mr. Levine had offered no concrete evidence to support his allegation that the charges against him were substantially motivated by the Respondents' retaliatory animus.

In September of 1997, after the three year penalty was served, the Petitioner returned to work at the school district. He was initially assigned to a different position though at the same rate of pay and with the same title of High School Assistant Principal. During the temporary reassignment, he held the position of administrator in charge of the Whippoorwill School. This building was used by the District for its maintenance and grounds operations and operates as a nursery school, central storage, and as a meeting place for the boy scouts and other community activities. Mr. Levine held this position for approximately two weeks, at which time he returned to the high school and recommenced his role as a high school assistant principal.

The decision to assign him to that facility was based on his coming off a three-year suspension and a desire to gradually phase him back into the district. The decision to assign Mr. Levine to Whippoorwill was made by Dr. Paul Lochner, the new Superintendent of the Hauppauge Public Schools. The Board of Education was not involved in this decision. Dr. Lochner had never met the petitioner prior to his decision to temporarily assign Mr. Levine to the Whippoorwill school. Mr. Levine, in a letter dated August 1, 1997, complained to Dr. Lochner regarding this new

assignment. In response to this grievance, Dr. Lochner reassigned Mr. Levine back to the high school during the second week of the school year.

Mr. Levine also filed a grievance pursuant to the collective bargaining agreement with the teacher's union, HAAP, concerning his assignment to Whippoorwill School. The matter was rapidly resolved between Mr. Cohen, the school's attorney, and counsel for Mr. Levine. The only issue that the union found to be grievable was the earlier time at which Mr. Levine had to report to work resulting in a slight increase in the number of hours worked by Mr. Levine. The assignment to Whippoorwill and the duties that he was requested to perform at that location were found not to be grievable. Mr. Levine was represented by Robert Saperstein, Esq. in the grievance before the teacher's union. Mr. Levine was paid for the additional time owed him under the collective bargaining agreement at that time. The Second Circuit concluded that Mr. Levine had failed to meet his burden of proving that his speech was a substantial motivating factor in the decision to assign him to the Whippoorwill School because he had only offered conclusory allegations and his own opinions in support of his claims.

REASONS FOR DENYING THE WRIT

Respondents submit that *no compelling* reasons exist in support of a grant of this petition.

The New York Court of Appeals has not decided any *important federal question* which conflicts with any other state court or a United States Court of Appeals.

The order of the Court of Appeals for the Second Circuit affirming the grant of summary judgment *does not conflict* with any decisions of other United States Courts of Appeals or with any decisions of New York's Court of Appeals.

Further, the original decision of the district court granting summary judgment as well as the order affirming that decision *does not raise any important questions* of federal law that need be resolved by this Honorable Court.

This case merely relates to the granting of summary judgment upon a finding of the lack of the existence of any *material issues of fact* and such a ruling should remain undisturbed.

Neither the Constitution of the United States of America nor the Constitution of New York State or any of its respected principles are implicated by the granting of summary judgment on behalf of the Respondents.

ARGUMENT

THE PETITIONER FAILED TO DEMONSTRATE ANY GENUINE ISSUES OF MATERIAL FACT SUFFICIENT TO DEFEAT THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT

The Second Circuit correctly applied the standard for granting summary judgment to this matter and concluded that the Petitioner failed to present any genuine issues of material fact sufficient to defeat a motion for summary judgment. It is well recognized that conclusionary allegations of retaliation cannot defeat a summary judgment motion. *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2nd Cir. 1983); *Finnegan v. Board of Education of School District of Troy*, 30 F.3d 273, 274 (2nd Cir. 1994). The non-moving party must show that a disputed material facts exists in light of the substantive law by offering "concrete evidence from which a reasonable juror could return a verdict in [its] favor." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2nd Cir. 1988). The petitioner failed to present any concrete evidence from which a reasonable juror could return a verdict in his favor and accordingly the grant of summary judgment by Judge Mishler and the subsequent affirmation by the Second Circuit should not be disturbed.

If after drawing all inferences and resolving all ambiguities in favor of the non-moving party, if it is evident that a "rational juror could not find for the non-movant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 191 (2nd Cir. 1991). It is well established that when moving for summary judgment, "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14,

18 (2nd Cir. 1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

To establish a retaliation claim under Section 1983, plaintiff must initially show that his or her conduct was protected by the First Amendment and that the defendants' conduct was motivated by or substantially caused by the plaintiff's exercise of free speech. *Bernheim v. Leit*, 79 F.3d 318, 324 (2nd Cir. 1996); *Easton v. Sundram*, 947 F.2d 1011,1015 (2nd Cir. 1991), cert denied 504 US 911, 112 S. Ct. 1943, 118 LE2d 548 (1992); *Mount Healy City School District v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568 (1977). To set forth a First Amendment retaliation claim, the plaintiff must demonstrate that the alleged improper action would not have occurred but for the plaintiff's exercise of freedom of speech. *Ezekwo v. NYC Health & Hospitals Corp.*, 940 F.2d 775 (2nd Cir. 1991).

The lower courts reviewed the evidence presented by the parties including pleadings, exhibits and deposition testimony and concluded that the Petitioner failed to adduce any evidence that the Respondents assigned Mr. Levine to the Whippoorwill School substantially on the basis of his speech or that his punishment for striking a student in the back of the head was the product of his alleged exercise of his First Amendment Rights. To survive a motion for summary judgment, the non-moving party must "do more than show there is some metaphysical doubt as to the material facts." *Matsuchita Elect. Indust. Co. v. Zeniti Radis Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Rather, the non-moving party is obligated to point to evidence that is sufficient to demonstrate each element of each claim raised. The Petitioner failed to produce admissible evidence in support of his claim of a violation of the First Amendment of the Constitution and

therefore, the Respondents were properly awarded summary judgment.

The Second Circuit applied the appropriate standard articulated by this Court and concluded that the Petitioner had failed to offer any concrete evidence to support a claim that the punishment for violating the corporal punishment policy or the assignment to the Whippoorwill School were motivated by an unconstitutional retaliatory animus.

The District Court, relying upon *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2nd Cir. 1990) (granting summary judgment became the 10-month period between the protected activity and alleged retaliatory action was insufficient to create an inference of retaliation), held that Mr. Levine failed to demonstrate an improper motive behind his assignment to Whippoorwill in 1997 for allegedly protected speech uttered in 1991 and 1992. Judge Mishler also held that the petitioner failed to demonstrate differential treatment from others similarly situated or any direct evidence of a retaliation animus. Mr. Levine also failed to demonstrate an improper motive in punishing him for striking a student in September of 1993 or any relationship to the allegedly protected speech in 1991 and 1992. The Petitioner has not challenged that portion of the Second Circuit's decision which held that he was barred from relitigating the imposition of and the severity of the punishment awarded for violating the School District's policy against corporal punishment. As a result, the Petitioner's inaccurate conclusions that the imposition of a three year suspension is evidence of differential treatment in retaliation for exercising his First Amendment Rights have been decided against the Petitioner and are not properly before this Honorable Court.

Merely concluding that the Respondents' motives were in retaliation for alleged protected speech which occurred years prior is insufficient to defeat a motion for summary judgment. "The summary judgment rule would be rendered sterile...if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." *Meiri v. Dacon*, 759 F.2d 989, 998 (2nd Cir. 1985).

Accordingly, the grant of summary judgment by the District Court and the affirmation of the decision by the Court of Appeals for the Second Circuit should not be disturbed and the current petition for a writ of certiorari be denied in its entirety.

CONCLUSION

By virtue of the foregoing, the Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Dated: Albertson, New York
September 13, 2000

Respectfully submitted,

BY: Kevin G. McMorrow
KEVIN G. MCMORROW (KGM-9974)

AHMUTY, DEMERS & MCMANUS
Attorneys for All Respondents
HAUPPAUGE UNION FREE SCHOOL DISTRICT, et al.
200 I.U. Willets Road
Albertson, New York 11507
(516) 294-5433
Our File No.: AIPZ1250KGM